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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *et al.*,
Appellants,

—against—

PHILIP M. KLUTZNICK, *et al.*,
Appellees,

—and—

THE STATE OF NEW YORK, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE STATE OF NEW YORK, *ET AL.*, TO DISMISS OR AFFIRM

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Appellees the State and City of New York and Mayor Edward I. Koch, intervenors in the court below, move to dismiss the appeal because it is not within the jurisdiction of this Court, or to affirm the judgment below because the questions presented are so unsubstantial as not to require further argument.

STATEMENT[1]

Less than four months before the start of the 1980 Census, appellants sued several federal officials who are charged with conducting the decennial enumeration of our nation's population. Appellants sought to overturn the Census Bureau's settled practice of attempting to count all persons in the United States on Census Day, a practice based on nearly 200 years of constitutional history. Appellants claimed that various of their constitutional rights were violated by inclusion in the Census population totals of so-called "illegal aliens" residing in the United States. Although appellants never proposed any practical method to effect the relief they sought (and indeed, repeatedly changed their description of that relief), they now demand that the Census Bureau somehow be enjoined from including "illegal aliens" in the population totals.

The Constitution mandates the use of Census figures to apportion Representatives in Congress among and within the states. Census totals are also used by the states to apportion their own legislatures. In addition, over 100 Federal grant programs allocate funds based in part on Census figures. The gist of appellants' claims is that including "illegal aliens" in the Census totals will inflate the population of certain urban areas and states thought to have high concentrations of "illegal aliens". Appellants claim that this will result in legislative malapportionment and distribution of Federal aid funds in violation of the Constitution.

A three-judge district court was convened below, appellants claiming that the action was one "challenging the apportionment of congressional districts" under 28 U.S.C. § 2284(a). The New York appellees intervened as of right. *See* J.S. App. at 2a.[2] We showed that the relief sought by

[1] Since the Federal appellees are also filing a motion to dismiss or affirm, we will limit the discussion in this memorandum to points that we believe will be of particular additional assistance to the Court in ruling upon the appeal.

[2] The intervening appellees are The State of New York, The City of New York, and Mayor Edward I. Koch, appearing in both his official capacity and as an individual citizen, taxpayer and voter.

appellants would directly injure our political and economic interests. Fed. R. Civ. P. 24(a). If appellants were to prevail, New York would, on appellants' theory, lose representation in Congress and Federal aid funds vital to its economic recovery. Moreover, we presented uncontradicted evidence in the court below showing that any attempt in the Census to distinguish "illegal aliens" from the rest of the population would sharply increase the large undercount of minority citizens and "lawful" aliens who form a relatively high proportion of New York's population.[3] Thus, we showed that the effect of the relief sought would be to reduce the Census count of persons in New York whom even appellants agree must be counted. Such an increase in the undercount would itself violate the Constitutional requirement that representation in Congress must be based upon "the whole number of persons in each State".

On cross-motions for summary judgment, the district court ruled in favor of the New York and the Federal appellees, dismissed the complaint and dissolved the three-judge court. The court held that appellants lacked standing to bring this action. The court also discussed appellants' claims for equitable relief, stating that their case was "very weak on the merits", J. S. App. 25a, and that other equitable considerations militated against relief, even assuming that appellants had standing.

[3] For example, as the Census Bureau has admitted, the undercount rate in the 1970 Census was four times as high for Blacks as for whites, and one out of every eight Black males over age 20 was not enumerated. Our evidence showed that the undercount rate for other minorities and "lawful" aliens was probably at least as high.

We also showed that the general distrust of minorities and aliens for governmental prying into their lives—which is one of the reasons for the disproportionality of the undercount—would be exacerbated if any overtone of enforcement of the immigration laws were combined with the census counting process. For the recently-arrived Jewish immigrant from the Soviet Union or the political refugee from Cuba, for example, personal questions (particularly as to legal status) posed by any government official are not likely to appear benign.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE APPEAL

Settled rules developed under the three-judge court statutes repealed in 1976 (former 28 U.S.C. §§ 2281, 2282) bar a direct appeal under 28 U.S.C. § 1253 in this case.

A direct appeal would not lie where, as here, a three-judge court holds that plaintiffs seeking injunctive relief lack standing. *Gonzalez v. Employees Credit Union,* 419 U.S. 90, 91 (1974). *See also, MTM, Inc. v. Baxley,* 420 U.S. 799, 804 (1975).[4]

Alternatively, where, as here, a three-judge court dissolves itself after a finding that it lacks jurisdiction because the issue is one properly decided by a single judge, appeal lies only to the court of appeals. *See, e.g., Mengelkoch v. Industrial Welfare Comm'n,* 393 U.S. 83 (1968); *Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968); *Swift & Co. v. Wickham,* 382 U.S. 111, 128-29 (1965).

Appellants argue that these clear precedents should be disregarded because they are inapplicable to the new section 2284(a). In repealing the old three-judge court statutes, however, Congress pointedly did not change section 1253. Section 1253, and not the three-judge court acts, is the basis for this Court's jurisdiction. Accordingly, it is clear that Congress did not intend to alter this Court's rulings on its own jurisdiction to review three-judge court cases.

In any event, however, section 1253 by its own terms does not apply here since, as held below, the case was not "required" to be determined by a three-judge court. *See Gonzalez* v. *Employees Credit Union, supra,* 419 U.S. at 100-01 and n.19.

[4] While the district court did discuss the merits of appellants' claims, it found that the standing issue was "dispositive of this case". J. S. App. 10a. *See also, Id.* at 4a.

This is not an action "challenging the constitutionality of the apportionment of congressional districts", as section 2284(a) requires. There has as yet been no "apportionment of congressional districts" based upon the 1980 Census. While appellants cite ambiguous language from the legislative history referring to "any case involving congressional reapportionment", Jur. St. at 16, they ignore the specific statement that the requirement for a three-judge court was retained only "in cases challenging the constitutionality of any *statute* apportioning congressional districts". S. Rep. No. 94-204, 94th Cong., 2d Sess., at 12, 1976 U.S. Code Cong. & Ad. News 1988, 2000 (emphasis added). This is, of course, consistent with the repealed acts, which required three-judge courts only for challenges to the enforcement of state or federal statutes.

Indeed, appellants' argument that this is an "apportionment" case at all proves too much. They claim that their attack on census procedures should be viewed as a challenge to part of the "apportionment process". Jur. St. at 16. But myriad administrative decisions (for example, how to word Census questions, whether to mail questionnaires or to send census takers to each dwelling, etc.) arguably have an impact on the outcome of the census enumeration, and thus, the apportionment "process". It is inconceivable that Congress, which revised the three-judge court statutes in order to limit such jurisdiction, *see, e.g.,* S. Rep. No. 94-204, *supra,* at 3, 1976 U.S. Code Cong. & Ad. News at 1990, could have intended that section 2284(a) would apply whenever such administrative decisions are challenged.

II

THE APPEAL ALSO PRESENTS NO SUBSTANTIAL QUESTION REQUIRING FURTHER ARGUMENT

Even if this appeal were within the Court's jurisdiction, the questions presented are, on this record, so unsubstantial as not to require any further argument.

1. *This case is not a proper vehicle to resolve the issues that appellants claim to present.* Even apart from questions of standing,[5] appellants do not present a fit case for resolution by this Court. First, during the course of this litigation, appellants have been unable to describe any practicable change in Census procedures that would satisfy their interpretation of the Constitution. They successively proposed at least three different emergency changes in the Census before the April 1 Census Day, all of which were unworkable.[6] Now that Census Day has passed, the injunctive relief that appellants sought with respect to Census questionnaires is no longer of any use. Yet they persist in pursuing injunctive relief in their Jurisdictional Statement without ever saying what it is that this Court can actually do now to remedy the alleged wrong.

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[5] Appellants' standing is discussed by the Federal appellees and was the basis for the district court's holding. We will not repeat those arguments.

[6] One insurmountable practical (and legal) difficulty is, of course, the fact that there is no such thing as an "illegal alien" under the laws of the United States. Aliens in the United States have a right under the Due Process Clause to remain here—and hence their presence is "legal"—until they are found deportable upon a showing of "clear, unequivocal, and convincing evidence". *Woodby* v. *Immigration Naturalization Service,* 385 U.S. 276, 286 (1966). The determination of deportability requires resolution of many complex and arcane questions of fact and law that may only be made initially by the Attorney General or his designee. Even then, the Attorney General has broad authority to suspend or withhold deportation. A few questions on a census form could not possibly form a basis for accurately making these determinations, even assuming such questions would be answered honestly.

Second, over the last several years, the Census Bureau has repeatedly discussed its planned conduct of the 1980 Census with the Congress. There were extensive oversight hearings, covering even the specific questions to be asked, as well as the plans to count all persons including "illegal aliens". All of the individual appellants are Senators or Members of Congress. Yet they waited until just months before Census Day to file suit, when it was too late to make any changes without enormous disruption, delay and expense. *See* J. S. App. at 28a.

Third, while appellants styled this suit as an attack on Census procedures, it is clear that their real grievance is not with those procedures at all. Rather, appellants are disturbed by what they see as the failure of the Federal Government to carry out its responsibility to enforce the immigration laws. But any policy decision as to whether the Federal Government should more stringently enforce the immigration laws is committed neither to states like New York, where many "illegal aliens" may live and use public services, nor to the courts, but to Congress and the Executive Branch. In short, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," *Mathews* v. *Diaz,* 426 U.S. 67, 81 (1976), and appellants may not turn to this Court when they have failed in the proper forums.

2. *The plain language of the Enumeration Clause.* The result in this case is controlled by the unambiguous language of section 2 of the Fourteenth Amendment. That provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of *persons in each State,* excluding Indians not taxed." (emphasis supplied)

In all of their contrived political science theories, appellants have never met the fundamental issue here—that an individual does not have to prove his or her legal status, by possession of a "green card" or otherwise, in order to be a "person" "in" a state.

As they have throughout this litigation, appellants continue to confuse the clear language of the Enumeration Clause—which defines the population that must be used to apportion Representatives—with Constitutional directives concerning the electoral process itself. Thus, they claim that the issue here is whether "illegal aliens" are part of "'the People *of* the several States' secured by [the first sentence of] Article I, § 2 in the right of equal access to representative government." Jur. St. at 19 (emphasis supplied). But the first sentence of Article I, section 2 does not mandate or define a census. Its function—and the purpose of the reference to "Members chosen . . . by the People of the several States"—is to make the House of Representatives a popularly elected body.[7] The Framers knew that state franchise laws in 1789 excluded all but a small fraction of the "people of" each state from eligibility to vote. Yet they required Representatives to be "apportioned . . . according . . . to the whole Number of free Persons . . . ." The Framers thus intended the weight of one vote in a state having a higher proportion of nonvoting "persons" to be greater than one vote in a state having a smaller proportion. *See* p. 9 *infra.*

3. *The context of the Enumeration Clause.* When the Framers of the Constitution intended to exclude from enumeration a particular class of persons, they did so explicitly. Thus, "Indians not taxed" were specifically excluded, and slaves were specifically to be counted only as three-fifths of a person prior to the Fourteenth Amendment. In the face of such language, there is no basis for appellants' demand that this Court create another exception.

[7] Similarly, the verbal formulation originally used to describe the election of Senators provided that the Senators for each state were "chosen by the Legislature thereof". U.S. Const., Article I, section 3. When the Constitution was amended in 1913 to require popular election of Senators, a verbal formulation similar to the first sentence of Article I, section 2, was used to distinguish popular election from election by the legislatures: Senators from each state were to be "elected by the people thereof." U.S. Const., Amend. XVII.

4. *The contrast between the inclusive words of the Enumeration Clause and more limited language in adjacent clauses.* The Fourteenth Amendment itself carefully distinguishes between the broad term "persons" (used in section 2), and the narrower term "citizen" (used in part of section 1). Article I of the Constitution, as originally adopted, drew similar distinctions.

5. *The history of the adoption of the Constitution and the Fourteenth Amendment.* As we showed in detail in our briefs below, the theories of representation put forward in America from the Declaration of Independence to the Constitutional Convention, the circumstances of the "Great Compromise" at the Convention, and contemporaneous explanations of the Constitution by its Framers, all reinforce the conclusion that, when the Enumeration Clause required a count of the "whole Number of free persons", it indeed meant *all* free persons. As put by James Madison, it was a "fundamental principle" that the number of representatives allotted to the several states "is to be determined by a federal rule founded on the aggregate number of inhabitants." *The Federalist* (J. Cooke ed. 1967), No. 54, at 369.[8]

The history of the adoption of the Fourteenth Amendment also stands squarely against appellants. The Thirty-Ninth Congress explicitly considered, and rejected, proposals to change the basis of apportionment from the all-inclusive term "persons" to the narrower term "voters". It was specifically argued then that changing the historical apportionment base would be unjust because "many of the large States held their representation [in the House] in part by reason of their aliens". *Cong. Globe,* 39th Cong., 1st Sess., at 359 (1866). *See also,* J. S. App. at 26a.

6. *Subsequent interpretation of the Constitution.* Precisely the result sought by appellants here has thrice been urged upon

[8] The significance of the "aggregate number of inhabitants" principle is heightened by the fact that, as Madison recognized, in the earliest days of our Nation, some 80 percent of the inhabitants of the states were not entitled to vote. *The Federalist, supra,* No. 57, at 388.

the Congress and thrice been rejected by it. *See* J. S. App. at 26a-27a. On all three occasions, Congress understood that a constitutional amendment would be required to exclude from the census count all aliens and even persons "in this country in violation of law". *See, e.g.,* 86 *Cong. Rec.* 4372 (1940) (remarks of Representative Celler).

This Court's intrastate apportionment decisions simply are not relevant to the allocation of seats in Congress among the several states.[9] However, where this Court has spoken, in dicta, about Congressional apportionment among the states, it has interpreted Article I, section 2, as requiring national apportionment on the basis of each State's total population:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people', an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives." *Wesberry v. Sanders,* 376 U.S. 1, 13-14 (1964).

[9] As this Court has recognized, the system of state representation in the national Congress, including, among other things, provision for two senators and at least one representative for each state regardless of its population, is one "ingrained in our Constitution, as part of the law of the land" and "conceived out of compromise and concession indispensable to the establishment of our federal republic". *Reynolds* v. *Sims,* 377 U.S. 533, 574-76 (1964). Thus, no valid analogy can be drawn between apportionment of representation in Congress and intrastate legislative apportionment. *See also, Maryland Committee* v. *Tawes,* 377 U.S. 656, 675 (1964); *Roman* v. *Sincock,* 377 U.S. 695, 708-09 (1964); *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 738 (1964).

In any event, appellants' argument that their votes are diluted by inclusion of "illegal aliens" is circular. It assumes the very result sought by this suit—that such persons should not be counted. *See* J.S. App. at 27a.

7. ***It is fundamentally just to include all persons in a state in apportionment population totals.*** Appellants have suggested that it is somehow inherently unfair to base a state's representation in Congress upon population totals that may include "illegal aliens". Even assuming that "fairness" is properly considered in a case where the plain language of the Constitution controls, appellants still are wrong.

States that may have large numbers of "illegal aliens" are not responsible for the presence of these persons in the United States. The Federal Government bears the exclusive responsibility for enforcement of the immigration laws. *See, e.g., DeCanis v. Bica,* 424 U.S. 351, 354 (1976). Yet the states and cities must bear the burdens of the general government services used by every person within their borders. For example, the costs of providing police, fire, sanitation, education, highways, mass transit, and parks and recreation are increased by "illegal aliens" as much as by citizens.

Justice demands that those states which, because of default by the Federal Government in enforcing the immigration laws, bear almost the sole burden of a major national problem —"illegal aliens"—should be given greater representation in Congress, the one political body that can solve that problem. And it is fair that the taxpayers of those states should have Congressional representation to ensure that Federal aid programs are based on total population, thereby relieving those taxpayers of some of the burden that they carry for the entire country.

Finally, it would not be just for this Court to depart from the principles of the "Great Compromise", in which a bargain (reaffirmed by the Fourteenth Amendment) was struck by sovereign states in forming our nation. That agreement requires apportionment based on all "persons in" each state.[10]

[10] Indeed, because Congress must be apportioned on the basis of all "persons in each State", serious constitutional questions are raised by the existence of the large census undercount. The Census Bureau acknowledges its failure to enumerate all "persons", and particularly serious constitutional questions are posed by the disproportionate undercount of minorities and aliens. *Cf. Young* v. *Klutznick,* Civil Action No. 80-71330 (E.D. Mich., filed April 2, 1980), an action seeking to require that the 1980 Census include the estimated undercount in the population totals used for apportionment.

CONCLUSION

We recognize that Congress has promulgated rules regulating who may enter and remain in this country, and that more people escaping poverty and repression want to come here than the rules allow. But the means to solve that problem lie in the hands of Congress and the Executive. It is not proper to ask this Court to amend the Constitution where Congress has repeatedly refused to do so.

The appeal should be dismissed for lack of jurisdiction or the judgment should be affirmed.

May 27, 1980

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